

**IN THE TOWN PLANNING APPEAL BOARD**  
**Town Planning Appeals No. 1 and No. 2 of 2010**

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IN THE MATTER of the  
Town Planning Ordinance (Cap 131)  
and

IN THE MATTER of the Appeals  
Under section 17B by  
Mr. Lau King Keung & Mr. Lau King Tong  
(" the Appellants" )  
(represented by Mr. Lau King Pong)

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Appeal Board :	Ms. Sylvia SIU Wing-yee, JP	(Chairperson)
	Professor HO Kin-chung, BBS	(Member)
	Professor Lawrence LAI Wai-chung	(Member)
	Mr. LO Pui-yin	(Member)
	Ir. NG Kwok-chun	(Member)
In Attendance :	Ms Suan MAN	(Secretary)
Representation :	Mr. LAU King-pong, for the Appellants Mr. Samuel Lee (Senior Government Counsel), for the Respondent	
Date of Hearing:	28 <sup>th</sup> February 2011	
Date of Site Visit:	4 <sup>th</sup> May 2011	
Date of Decision:	24 <sup>th</sup> October 2011	

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# DECISION

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1. This is the decision of a majority of the Appeal Board. The dissenting opinions of Professor Lai Wai Chung, Lawrence and Mr Lo Pui Yin are provided in separate documents.

## **The Appeals**

2. These are two appeals by Mr. Lau King Keung and Mr. Lau King Tong (“ the Appellants”) to the Town Planning Appeal Board (“Appeal Board”) arising out of the rejection of their applications for planning permissions to build their respective New Territories Exempted Houses (“NTEH”) under s16 of the Town Planning Ordinance (Cap 131) (“TPO”).

## **The Appeal Sites**

3. The sites pertaining to these two appeals are located at Lots 749 S.B, 750 S.A and 751 S.A in D.D. 17, and Lots 749 RP and 750 RP in D.D. 17 in Ting Kok, Tai Po (“the Appeal Sites”). They are located outside the village ‘environs’ (‘VE’) of any recognized villages.

## **The then OZP**

4. Before these appeals were lodged, the Appeal Sites fell within the

“Agriculture” (“AGR”) zone on the then Ting Kok Outline Zoning Plan (“OZP”) and the s16 applications were considered by the Rural and New Town Planning Committee (“RNTPC”) and the Town Planning Board (“TPB”) upon the then OZP. The planning intention of “AGR” zone under the then OZP is:

*“This zone is intended primarily to retain and safeguard good quality agricultural land/farm/fish ponds for agricultural purposes. It is also intended to retain fallow arable land with good potential for rehabilitation for cultivation and other agricultural purposes.”*

### **Rejection by RNTPC**

5. The s16 applications were rejected by the RNTPC on 7<sup>th</sup> August 2009 for the following reasons:
  - (i) the proposed development did not comply with the interim criteria for consideration of application for the NTEH/Small House in New Territories as the sites were entirely outside the “Village Type Development” (“V”) zone and the ‘VE’ of any recognized villages; and
  - (ii) the approval of the applications would set an undesirable precedent for other similar applications in the area.

### **Rejection by TPB**

6. On 27th November 2009, TPB considered the Appellants’ review

applications under section 17 of TPO. TPB rejected the review applications for the same reasons given by the RNTPC. By a letter dated 11th December 2009, the Appellants were informed of the TPB's decision.

### **The latest OZP**

7. On 19th February 2010, the draft Ting Kok OZP No. S/NE-TK/16, incorporating amendments to the then OZP for the proposed spa resort hotel and two village extension areas, was exhibited for public inspection under section 5, TPO. Under the latest OZP, the Appeal Sites were zoned "Other Specified Uses" annotated "Spa Resort Hotel" ("OU(SRH)").

8. The planning intention of "OU(SRH)" zone is :

*"primarily to provide land for low-rise and low-density spa resort hotel development."*

9. Under the latest OZP, "House (NTEH only)" is a Column 2 use under the "OU(SRH)" zone and may be permitted with or without conditions on application to the TPB. The purpose of providing Column 2 uses is to provide flexibility to allow the TPB to consider other proposals which do not contravene the planning intention of the extant OZP. The development of a Small House would not contravene the "OU(SRH)" zone.

## **The Present Appeal**

10. Two appeals arise from and/or occasioned by TPB's rejection of the Appellant's applications to build two NTEHs on the Appeal Sites. The Appellants and the Respondent all agreed that the merits of the two appeals would have to be considered under the latest OZP only, not the then OZP. The Appeal Board is aware of the principle laid down in the Privy Council's decision in AG v Firebird [1983] 1 HKC 1, a case concerning the approval of building plans. There, Lord Roskill stated as follows:

*"...In their Lordships' view, any right which the respondents did acquire under this legislation was a right correlative with the public duty of the Building Authority to consider the plans according to law, and the relevant law must be the law applicable at the date when the Building Authority performs its statutory duty of considering the plans...and not some other spent law..."*(at p. 6I to 7A)

11. Further, the Appeal Board is entitled to disagree with the TPB as its function is to exercise an independent planning judgment. See Henderson Real Estate Agency Ltd v. Lo Chai Wan [1997] HKLRD 258 at p. 266F ("Henderson").

## **Material considerations which the TPB and the Appeal Board should take into account**

12. Foremost consideration is that the TPB and the Appeal Board must take into account the relevant plan (OZP). This is because under section 16(4) of the TPO, the TPB may grant planning permission only to the extent

shown or provided for or specified in the OZP.

13. In Henderson, the Privy Council also pointed out that the Town Planning Appeal Board, like the TPB, is also bound by section 16(4) of the TPO.
14. Another important and relevant consideration to take into account is the Interim Criteria which embodies the planning intention of the TPB.

### **Interim Criteria**

15. The “Relevant Revised Interim Criteria for Assessing Planning Applications for the NTEH /Small House Development in the New Territories” (“Interim Criteria”) was approved by the TPB and was adopted specifically to ensure a consistent and coordinated approach in assessing applications for NTEH/Small House developments.
16. The Interim Criteria include the following:
  - (a) sympathetic consideration may be given if not less than 50% of the proposed NTEH/Small House footprint falls within the ‘VE’ of a recognized village and there is a general shortage of land in meeting the demand for Small House development in the “V” zone of the village;
  - (b) if more than 50% of the proposed NTEH/Small House footprint is located outside the ‘VE’, favourable consideration could be given if not less than 50% of the proposed NTEH/Small House footprint falls within the “V” zone, provided that there is a general shortage of land in meeting the demand for Small House development in the “V” zone and the other criteria can be satisfied;
  - (c) development of NTEH/Small House with more than 50% of the footprint outside both the ‘VE’ and the “V” zone would

normally not be approved unless under very exceptional circumstances (e.g. the application site has a building status under the lease, or approving the application could help achieve certain planning objectives such as phasing out of obnoxious but legal existing uses);

- (f) the proposed development should not frustrate the planning intention of the particular zone in which the application site is located; and
- (k) all other statutory or non-statutory requirements of relevant Government departments must be met.

### **The Grounds**

17. The Appellants contend that the TPB's decision in its letter dated 11<sup>th</sup> December 2009 (arrived at pursuant to its review) was wrong and unjustified in that:

- (i) *The Appellant's applications to build small houses on their land in the area are not precedent cases;*
- (ii) *The TPB did not adhere to Para (d) of the Interim Criteria (promulgated on 7th September 2007);*
- (iii) *The Appellants have a legitimate expectation that their applications would be granted as the Government department has previously approved three houses in the area; and*
- (iv) *The Appellants' applications have been prejudicially treated against the fact that the Government department had approved three existing houses in the area.*

18. The Appellants now set out nine grounds of appeal, namely:
- (i) The TPB failed to give due and proper consideration on the Appellants' Small House applications in 1978 and their legitimate expectation;
  - (ii) The TPB failed to give due consideration to paragraph (d) of the Interim Criteria;
  - (iii) The Government has set precedents by approving houses No. 225, 226 and 227;
  - (iv) The Government had wrongly rejected the 1978 applications submitted by one of the Appellants and his late father. For the Appellant's application submitted in 1997, the Government's refusal to process the application was procedurally wrong as it did not give the Appellants the opportunity to make good the defects in the application;
  - (v) The zoning of the appeal sites should no longer remain as "AGR" at the time of considering the Appellants' cases. In taking wrong fact, the TPB's decision in rejecting the Appellants' cases was wrong;
  - (vi) The first statutory town plan for Ting Kok area was made without the Appellants' knowledge and thereby deprived their rights for consultation;



- (vii) The applications were made before the Hand-over, in 1978 and March 1997, respectively. The TPB's rejection is in contravention of Article 40 of the Basic Law;
- (viii) The Appellants were not able to submit applications to the TPB in 1978 as the TPB did not exist at that time; and
- (ix) The TPB failed to give due consideration to the Appellants' statement of appeal dated 10th September 2009.

#### **TPB's Witnesses**

- 19. TPB called two witnesses: (i) Ms Lisa Cheng, Senior Town Planner of the Tai Po District; and (ii) Mr. Sin Kwok Kwong, Senior Land Executive of the District Lands Office/Tai Po ("DLO/TP").

#### **The Appellants' Witness**

- 20. The two Appellants authorized their brother Mr. Lau King Pong to conduct the two appeals, and to give evidence on their behalf.

#### **Site Visit**

- 21. On 4<sup>th</sup> May 2011, the Appeal Board conducted a site visit to the Appeal Sites. It was noted that the surrounding areas of the Appeal Sites are predominantly rural in character comprising a few village houses and fallow agricultural land with scattered tree groups and orchards.
- 22. The Appeal Board have read and considered all the submissions and the

materials produced by the Appellants and the Respondent. Whilst the Appeal Board does not, in this decision, recite all the arguments put forward by the parties, all the oral evidence and the documents read, the Appeal Board, for the sake of clarity, states that due consideration has been made of all material matters.

### **The Appeal Board's Independent Judgment**

23. As the Appeal Board has the mandate to exercise an independent planning judgment, how the RNTPC and the TPB decided previously and the reasons of their respective decisions do not fetter the view of the Appeal Board. The Appeal Board has to make an independent planning decision upon the present circumstances and the latest OZP.

### **Decision of the TPB**

24. It is noted that the previous planning intention for the Appeal Sites was “AGR”.
25. As a result, the Appellants should have applied for the Appeal Sites to be used in a manner consistent with an “AGR” site and the planning intention.

### **Interim Criteria**

26. It is noticed that “Houses (NTEH only)” is a Column 2 use and under “AGR” zone, NTEHs may be permitted with or without conditions on application to the TPB. However the conditions imposed by the Interim Criteria adopted for consideration and assessment of NTEH applications

have to be met.

27. As can be seen from the Interim Criteria at paragraph 16(c) above, if more than 50% the footprint of the proposed NTEHs lies outside both the 'VE' and the "V" zone, approval would not normally be granted unless under very exceptional circumstances.
28. Evidence has been submitted by the TPB that the proposed development and the Appeal Sites are entirely outside both the "V" zone and the 'VE' . Whereas, no evidence has been submitted by the Appellants to challenge this.
29. As such, unless the Appellants adduced evidence to show very exceptional circumstances, there was no basis for the TPB to approve the proposed development on the Appeal Sites.
30. In the circumstance where the TPB did not find any overwhelming exceptional circumstances, the TPB did not err in its rejection (dismissal) of the appeals made to it. Similar rejections have been cited in "Town Planning in Hong Kong", by Professor Lawrence Wai-Chung Lai at pp 262-263, in the case of Lots 243 and 244 in DD 113, Kam Tin, Appeal Case No.02/01, although Professor Lai did state at p268 that:

"I am a faithful critic of the abuse of the concept of 'planning intention' as a categorical reason to dismiss a planning appeal for a Column 2 use, as this is patently illogical. This is so, though this criticism does not mean that the appeals dismissed on this ground should have always been allowed. In this case, 'New Territories Exempted House' is a Column 2 use in the Agriculture Zone. The

respondent, the Town Planning Board, has a consistent schizophrenic policy of intending something (by *statutorily* permitting house development in a Green Belt Zone) while rejecting houses from time to time on this ground per se.

I would assert that the stubborn use of planning intention by so many well-learned judges and senior counsels in Hong Kong will go down in planning history as an enigma.”

### **Setting an undesirable precedent**

31. Further, Ms Lisa Cheng, Senior Town Planner of the Tai Po District gave evidence that there have been seven similar applications for Small House developments within the “AGR” zone in the vicinity of the Appeal Sites since the first promulgation of the Interim Criteria on 24th November 2000.
32. Out of those seven applications, two of them (No. A/NE-TK/128 and 137) were approved with conditions on 22nd December 2000 and 19th October 2001 respectively, because more than 50% of the footprints of the proposed Small Houses fell within the “V” zone/the ‘VE’ and there was a general shortage of land in meeting the demand for Small House development within the village concerned.
33. Four applications (No. A/NE-TK/239 and 267 on the same site, A/NE-TK/289 and 331) were rejected on 2nd November 2007, 9th January 2009, 21st August 2009 and 26th November 2010 respectively because the footprints of the proposed Small Houses were located entirely outside both the “V” zone and the ‘VE’ and that giving approval would

set an undesirable precedent.

34. Another application (No. A/NE-TK/304) for two NTEHs was rejected on 11th June 2010 because the site served as a buffer between the existing Ting Kok Village to its west and the proposed spa resort hotel to its east. Approval of the application would disintegrate the buffer.
35. The Appeal Board noted that apart from the Lands Department, other Government departments such as Agriculture, Fisheries and Conservation Department did not support the applications. The Transport Department also had reservation on the applications.
36. It has been submitted to the Appeal Board that approval would set an undesirable precedent. The cumulative effect would also cause adverse impact and thwart the planning intention of the latest OZP. Having visited the Appeal Sites and seen the surrounding landscape, the Appeal Board concurs that if permission is granted for NTEHs to be erected on the Appeal Sites, it would set an undesirable precedent.
37. The Appeal Board agrees with the decisions of the TPB to dismiss the appeals. The upshot of the above findings is that the appeals to the Appeal Board should similarly be dismissed and there may not be any need for the Appeal Board to deal with each of the Appellant's grounds.

### **The Appeal Board's own planning judgment**

38. The Appeal Board is also empowered to make its own planning judgment in regard to the Appeal Sites.

39. Under the latest OZP, the Appeal Sites have been up-zoned to “OU(SRH)”. The present planning intention is “*primarily to provide land for low-rise and low-density spa resort hotel development*”.
40. It is also noticed that “Houses (NTEH only)” is a Column 2 use and under “OU(SRH)” zone, NTEHs may be permitted with or without conditions on application to the TPB. However, similarly, the Interim Criteria adopted for consideration and assessment of NTEH applications have to be met.
41. As can be seen from paragraphs 27 and 28 above, the footprint of the proposed NTEHs lies outside both the ‘VE’ and the “V” zone, approval would not normally be granted unless under very exceptional circumstances.
42. As such, unless the Appellants adduce evidence to show very exceptional circumstances, there is no basis for the Appeal Board to approve the proposed development for NTEH to be erected on the Appeal Sites. It is the finding of the Appeal Board that no exceptional circumstance has been shown and upon independent decision, the Appellants’ applications would similarly be rejected.
43. Whilst it may be unnecessary to deal with each of the other matters raised by the Appellants, for completeness, the Appeal Board will address the Appellant’s other grounds in turn:

**Appellants’ Ground 1**

*The TPB failed to give due and proper consideration to the Appellants’ Small House applications in 1978 and their legitimate expectation*

44. Evidence was adduced that Mr. Lau King Keung and his late father Mr. Lau Hing submitted applications to the District Office in 1978 to build Small House at the Appeal Sites in 1978. While approval was given to the applications for houses No. 225, 226 and 227 submitted by others, the said applications were rejected. It is argued that the TPB should give due and proper consideration to their applications made in 1978 and their legitimate expectation in light of the approved houses No. 225, 226 and 227.
45. The TPB adduced evidence that the first statutory plan (i.e. IDPA Plan) covering the Ting Kok area was published in the Gazette on 7th September 1990. The Appeal Board accepts that at the time, no village house was in existence at the application site. However, the three houses (No. 225, 226 and 227), which were approved, were actually already in existence. They were regarded as “existing use” that would be allowed to continue on site until there is a change of use or the building is redeveloped. In fact, no planning permission from the TPB was required for the three existing village houses.
46. The above are matters that Mr. Lau King Keung and his late father Mr. Lau Hing well knew and the considerations that went to the Appellants’ 1978 applications necessarily differ from the three pre-existing houses and recitation of the expression “legitimate expectation” does not make it arise.

**Appellants’ Ground 2**

*The TPB failed to give due consideration to paragraph (d) of the Interim Criteria*

47. The Appellants claim that as the applications to build the Small Houses have been made at an advanced stage since 1978, the TPB should give due consideration to the Appellants' applications for NTEH/Small Houses having regard to the assessment criteria in paragraph (d) of the Interim Criteria.
48. Paragraph (d) of the Interim Criteria in fact states that "*application for NTEH/Small House with previous planning permission lapsed will be considered on its own merits. In general, proposed development which is not in line with the criteria would normally not be allowed. However, sympathetic consideration may be given if there are specific circumstances to justify the cases, such as the site is an infill site among existing NTEHs/Small Houses, the processing of the Small House grant is already at an advance stage*".
49. The Appeal Board observes that Criterion (d) of the Interim Criteria only refers to applications "*with previous planning permission lapsed*". It is not applicable to the Appeal Sites where planning permission has never been granted.

**Appellants' Ground 3**

*The Government has set precedents by approving houses No. 225, 226 and 227*

50. As aforesaid, houses Nos. 225, 226 and 227 were pre-existing and were erected without requiring approval by the TPB. As such, the Appeal Board accepts that they cannot be taken as similar or precedent cases for



the purposes of the appeal. Further, they were considered as “existing use” cases.

**Appellants’ Ground 4**

*The Government had wrongly rejected the 1978 applications submitted by one of the Appellants and his late father. For the Appellant’s application submitted in 1997, the Government’s refusal to process the application was procedurally wrong as it did not give the Appellant an opportunity to make good the defects in the application*

51. The Appeal Board accepts evidence adduced by Mr. Sin Kwok Kwong that the applications for Small House development submitted in 1978 do not concern the TPB as planning permission was not required at that time. Further, the 1978 applications were rejected because by that time the ‘VE’ boundary had already been laid out and the proposed houses fell out with ‘VE’.
  
52. (i) As to the application submitted in 1997, evidence is that application was submitted to the DLO/TP only for processing under the New Territories Small House Policy and not the TPB. Further the 1997 application was rejected as the applicant of that application was not the sole registered owner of the lots. The Appeal Board accepts TPB’s evidence that the applicant in 1997 was given the opportunity to rectify and re-apply, but chose not to do so. By a letter dated 23rd August 1998, Mr. Lau King Keung of the Appellants stated: “***Now I understand that I have to register the lands in my name in order that I can proceed with my application. In this connection I shall begin the conveyance procedures to register the above lands in my name. However, in view of the fact that the conveyance procedures may take some times to complete I shall be much obliged if you could grant me further time to***

*proceed with my application. If required, I shall write to inform you the progress of the conveyance procedures from time to time.*" (emphasis supplied)

(ii) By a letter dated 8th October 1998, DLO/TP granted a further 3-month period to Mr. Lau King Keung with effect from 16th September 1998 to secure the lots, failing compliance by the deadline would result in a rejection of the application. Mr. Sin Kwok Kwong gave evidence that his office had not heard from Mr. Lau and Mr. Lau did not continue with the application after the 8th October letter.

**Appellants' Ground 5**

*The zoning of the Appeal Sites should no longer remain as "AGR" at the time of considering the Appellants' cases. In taking wrong fact, the TPB's decision in rejecting the Appellants' cases was wrong.*

53. The Appellants' claim that by the time when their cases were considered by the TPB on 27<sup>th</sup> November 2009, the zoning of the Appeal Sites had changed to "OU(SRH)" and are no longer "AGR"; and the TPB had wrongly taken "AGR" into its deliberation in rejecting the Appellants' applications.
  
54. The Appeal Board accepts that the RNPTC had agreed in principle on 27<sup>th</sup> February 2009 to the section 12A application to rezone the site from "AGR" to "OU(SRH)". However, the TPB was required to seek the Chief Executive in Council's agreement before it could refer the OZP back to the TPB to carry out the zoning amendment on the OZP. The rezoning of the concerned sites (including the Appeal Sites) to "OU(SRH)" was only effected on 19<sup>th</sup> February 2010 when the zoning amendment was published under section 5 of the TPO.

55. When the matter was submitted to the TPB on 10<sup>th</sup> June 2009 and subsequently considered by the RNTPC on 7<sup>th</sup> August 2009 and the TPB on 27<sup>th</sup> November 2009, the zoning of the Appeal Sites remained as “AGR”, rather than “OU(SRH)” as suggested by the Appellants.

**Appellants’ Ground 6**

*The first statutory town plan for Ting Kok area was made without the Appellants’ knowledge and thereby deprived their rights for consultation*

56. The Appeal Board accepts the evidence of Ms Lisa Cheng on behalf of TPB that all statutory plans for Ting Kok area have followed all statutory procedures required under TPO in force at that time. They were all published and notified in the Gazette and members of the public can submit objections / representations on any items shown on the Plan and on the Notes and there was and is no requirement under the TPO to give prior notice to any person who was likely to be affected by the town plan. In fact, evidence is that the Appellants at the time of the first statutory town plan for Ting Kok were residing in the United Kingdom, outside of Hong Kong. The Appeal Board rejects the Appellants’ allegation that they had been deprived of their rights of consultation.

**Appellants’ Ground 7**

*The applications were made before the Hand-over, in 1978 and March 1997, respectively. The TPB’s rejection is in contravention of Article 40 of the Basic Law*

57. The Appellants claim that Mr. Lau King Keung and his late father made Small House application in 1978 and Mr. Lau King Keung made an application again in March 1997. As both applications were made before the Handover in July 1997, the TPB’s rejection of their applications was in contravention of Article 40 of the Basic Law (“BL40”).

58. The Small House applications of 1978 and 1997 were submitted to respectively, the District Office and Lands Department for approval and were not section 16 planning applications. The present planning applications to the TPB were submitted after the Handover. The Appeal Board accepts that NTEHs are subject to statutory planning controls which predated the reunification. The Appeal Board accepts TPB's submission that the continuation of planning control after reunification is not inconsistent with BL 40.

**Appellants' Ground 8**

*The Appellants were not able to submit applications to the TPB in 1978 as the TPB did not exist at that time*

59. The Appellants contend that the Small House applications had been made in 1978 to the District Office, and 1997 and 2006 to the DLO/TP. In relation to the 1978 application, the Appellants claim that they were not able to submit the application to the TPB as the TPB did not exist at that time. For the 1997 and 2006 applications, the Appellants contend that the DLO/TP should have directed the Appellants to submit the applications to the TPB but it had not done so. The Appellants' complaint and allegation is that the TPB had disposed of the Appellants' applications irresponsibly by shunting its responsibility and by using excuses to reject the Appellants' applications.
60. The Appeal Board is not with the Appellants in respect of these allegations against the TPB. On the evidence, the TPB was exercising responsibly the statutory powers delegated to it for planning control when the appeal was made to it.

**Appellants' Ground 9**

*The TPB failed to give due consideration to the Appellants' statement of appeal dated 10.9.2009*

61. The Appeal Board accepts that the Appellants' statement of appeal in fact formed part of the submission for the review under section 17 of the TPO and had been attached to TPB Paper No. 8453 as Annex E. It had been duly summarized and responded to in the paper submitted for consideration of the TPB on 27<sup>th</sup> November 2009. The Appellants' representative Mr. Lau King Pong had also attended the TPB meeting on 27<sup>th</sup> November 2009 to present his case to the TPB. Due consideration had been given to the Appellants' statement of appeal by the TPB.

### **Conclusion**

62. We find that each of the other 9 grounds proffered by the Appellants had not been established and there is no merit in the Appellants' appeals. By a majority of 3:2, we for the reasons stated above similarly dismiss the appeals (the Appellants' applications).

(Signed)

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Ms. Sylvia SIU Wing-yee, JP  
(Chairperson)

(Signed)

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Prof. HO Kin-chung, BBS  
(Member)

(Signed)

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Ir. NG Kwok-chun  
(Member)

## **Town Planning Appeals No.1 and No. 2 of 2010**

**Appeal under Section 17B of the Town Planning Ordinance by**

**Mr. Lau King Keung & Mr. Lau King Tong**

### **Dissenting Opinion**

#### **Background**

1. At the time of the s.16 applications, the sites in this appeal (the appeal sites) were situated within an Agriculture (AGR) zone in the *Ting Kok Outline Zoning Plan (OZP) No. S/NE-TK/15*. The zone lies to the north of Ting Kok Road, which serves as its southern perimeter. Previously this zone was surrounded by a Village Type Development (V) zone to the west, a Green Belt (GB) zone in the north, and a Recreation (REC) zone in the east. The applications under appeal were for two “New Territories Exempted Houses” (NTEHs) or “small houses”.

#### **Evidence heard**

2. During the course of the hearing the Respondent confirmed, in response to questions posed by a member of the Appeal Board in

relation to the written materials the Respondent furnished, the following:

(a) The “Interim Criteria” were not statutory, but purely administrative;

(b) the applicable OZP made no reference to the “Interim Criteria”;

(c) the “Interim Criteria” did not provide or include any specific conceptual or design and disposition standards for NTEH within any AGR Zone in the relevant OZP;

(d) the “Interim Criteria” were not accompanied by any mapping information on the Village Environs (VE), although a member of the public may find such information from the Town Planning Board (TPB);

(e) no part of the relevant AGR zone fell within or was covered by any part of a VE; and

(f) the Respondent’s objection to the planning applications was based solely on the grounds that the sites in both applications did not lie within a VE and that the usual basis upon which to refuse planning permission, “planning intention”, was NOT an issue.

**Reasons for my dissenting view**

3. The material fact in this appeal is that the Respondent’s only objection to both applications was that their sites did not lie within a VE. In other words, this was the sole consideration taken into



account by the Respondent during the appeal. This however is an irrelevant consideration as explained below.

4. It is common ground that the VEs were defined by the government back in the 1970s as a means to allocate small house development entitlements, which were interpreted by the Respondent as a policy via the “Interim Criteria” to regulate the development of small houses in AGR zones. While the TPB is entitled to formulate its own planning policy and may adopt a land administration policy as its own, it should never adopt a policy *during* or *after* a plan is made, which, in effect, rezones the plan. That violates the *due process* of allowing the public to make objections to that policy. In this appeal, the AGR zone in question “small house development” was completely pre-empted by the “Interim Criteria,” as not a single square metre of land in this particular zone fell within a VE. [There can be a technical question as to whether the VE within the AGR zone along the shore Tolo Harbour might help. The answer must be in the negative as that was another zone separated from the zone within with the appeal sites are located by Ting Kok Road, which was itself a zone and a real physical buffer.] I would go along with the majority of the panel IF there exists at least an area as

little as 700 square feet within the AGR zone where theoretically speaking the Appellant might have bought to make a planning application for a standard VTH. That theoretical possibility did not exist to the prejudice of the Appellant or any applicant and I doubt if the Respondent had checked whether such area existed at all when the area was zoned.

5. That the Column 2 use, “New Territories Exempted House,” has been practically deleted/pre-empted *ab initio* in this way by an administrative policy (the “Interim Criteria”) and that the Respondent relied on this policy alone to veto the development of small houses is patently unreasonable. The court in *International Trader Limited v. The Town Planning Appeal Board and the Town Planning Board* (Civil Appeal No. 407 of 2007) reminded the boards under the *Town Planning Ordinance* to stick to the statutory plan and not to take into account considerations, even when material, that fell outside *the ambit of an approved plan*. The “Interim Criteria,” insofar as *they revealed no mapping details for public scrutiny when the approved plan was gazetted*, are exactly of the kind ruled out by this leading Court of Appeal decision, if not by the general principle of the administrative law of due process. If the

Respondent's logic about a VE for the subject zone holds, then no applicant could have ever succeeded in obtaining planning permissions for small houses in this zone: the Column 2 use in question was, in effect, a phantom one. The Respondent, if rational and careful, could not have "intended" the absurd impossibility of granting permissions when it made the town plan.

6. I find it procedurally unjust NOT to ignore the Interim Criteria as irrelevant and proceed to evaluate the merit of the two appeals, which is a relevant consideration the Respondent should have but has not taken into account in refusing planning permission and in resisting the appeal.
  
7. While I am sympathetic to the Appellant, whose family has a long and frustrated history of getting small house applications through on privately-owned rather than government land, this Board needs to ensure that the development of the AGR zone is proper in planning terms. I realize that my sympathy is at variance with the majority of the Appeal Board panel, who are more concerned with the Appellant's history of application and true intention as to how the proposed houses, if permitted to be built, would be used. My

concern lies rather with the issues of fair and proper planning procedures and land use compatibility, not suppositions about history or the private intentions of the Appellant.

8. I also disagree entirely with the majority view on “planning intention” and do not find their reference to one of my publications on planning appeals of relevance to this particular example. However, I shall not dwell on it here as the Respondent admitted that it was not its concern. The Respondent’s sole concern in the appeal hearing, as a great enigma, was whether the NETHs fell within any VE. Changes in ownership or possession of properties are not valid planning concerns, but land use compatibility is a valid concern.

### **Recommendation**

9. In light of the above and my observations during the Panel members’ site visit to the appeal sites, as a Registered Professional Planner I find that the proposed small house under Appeal No. 1 of 2010 is too bulky while, at the same time, it is too close to both an existing village house (No. 227 Shan Nam Road) and the proposed small house under Appeal No. 2. Thus, it is objectionable as a matter of

sound planning principle. I find it possible to agree with the Appeal Board's majority verdict to dismiss that appeal on substantive planning grounds per se but not their reasoning about VE. The appellant may wish to make a fresh application to the TPB for a development of a smaller size, lower height, and better disposition in line with the arrangement of Nos. 225 and 226 Shan Nam Road.

10. I consider, however, it proper to allow Appeal No.2 of 2010 on the condition that its external finishes blend in with the rural environment and that the TPB specifies the requirements for such finishes in terms of both material and colours.

(signed)

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Professor Lai Wai Chung, Lawrence

24 October 2011

## **Town Planning Appeals No. 1 and No. 2 of 2010**

**Appeals Under section 17B by**

**Mr. Lau King Keung & Mr. Lau King Tong**

### **Dissenting Opinion**

#### **Introduction**

1. I have read in draft the majority decision and the dissenting opinion of Professor Lai Wai Chung, Lawrence. Having reflected on the matters set out in the two drafts, I respectfully dissent.

#### **Reasoning**

2. Professor Lai makes valuable reference to the Court of Appeal's judgment in *International Trader Limited v. The Town Planning Appeal Board and the Town Planning Board* [2009] 3 HKLRD 339. Hartmann JA summed up in paragraph 51 of his judgment in that appeal (to which Stock JA and Chu J (as they then were) agreed) that: "on a true construction of the [Town Planning Ordinance], when determining an application for planning permission under s.16, the Board does *not* have the power to have regard to any and all planning considerations which it believes will assist it to reach the right decision in the public interest. The Board's discretion is one that must be exercised within the parameters of the approved plan in question. Accordingly, if it takes into account material considerations which fall

outside of the ambit of an approved plan, considerations which are therefore not relevant to it, it acts *ultra vires*.”

3. Planning control in the present case was first introduced under the Ting Kok Interim Development Permission Area Plan, which was published in the Gazette on 7 September 1990.<sup>1</sup>
4. Paragraph 6.1 of the Statement of Ms Cheng Lai Sum, Lisa indicated that the “Interim Criteria” were first endorsed by the Rural and New Town Planning Committee (RNTPC) of the TPB on 24 November 2000 as “[the] planning criteria and broad principles for consideration of NTEH/Small House applications”. Paragraph 6.2 of the same statement further made the point that “[in] assessing the subject applications pursuant to sections 16 and 17 of the Ordinance, both the RNTPC and TPB had made reference to the relevant Interim Criteria”. I further note the matters of evidence recited in paragraph 2 of Professor Lai’s dissenting opinion.
5. The parameters of the latest OZP are set out in the plan itself and the notes to the plan. Paragraph (2) of the notes states: “Any use or development which is always permitted or may be permitted in accordance with these Notes must also conform to any other relevant legislation, the conditions of

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<sup>1</sup> See Plan No. IDEA/NE-TK/1, referred to in paragraph 5.1 of the Statement of Ms Cheng Lai Sum, Lisa.

the Government lease concerned, and any other Government requirements, as may be applicable.”

6. Professor Lai notes the common ground that “the VEs were defined by the Government back in the 1970s as a means to allocate small house development entitlements”. While this may qualify under “any other Government requirements” that an applicant for planning permission should conform *afterwards*,<sup>2</sup> in my respectful opinion, the RNTPC and the TPB, in adopting and operating the “Interim Criteria” for assessing planning permission applications for New Territories Exempted House/Small House Development in the New Territories, had imposed and applied a parameter not found in the OZP and accordingly had overreached its statutory power under ss 16 and 17 of the TPO. The resultant decisions in the present case must be regarded as having been reached *ultra vires*. With respect, I would decline to confirm the decisions of the TPB appealed against.

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(Signed)

Mr. Lo Pui-yin

24 October 2011

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<sup>2</sup> See the Lands Department’s pamphlet on *The New Territories Small House Policy – How to Apply for a Small House Grant* (Revised Edition, June 2001), Paragraph (I)(C)(c) and Explanatory Notes (b) and (g) (accessible at: <http://www.landsd.gov.hk/en/legco/house.htm>).